U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNA SALINAS, on her behalf and on behalf of those similarly situated,	§	
	§	
Plaintiff,	§	Civil Action No. 3:04-CV-1861-B
	§	
v.	§	
	§	
O'REILLY AUTOMOTIVE, INC.,	§	
	§	
Defendant.	§	

DEFENDANT'S BRIEF IN SUPPORT OF MOTION
TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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Defendant O'Reilly Automotive, Inc. files this Brief in Support of Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) and would show the Court as follows:

I. INTRODUCTION

Plaintiff's counsel has stated to the media and to Defendant's counsel that Plaintiff intends to pursue this case on a nationwide basis.[1] Because Plaintiff seeks to prosecute this case as a nationwide collective action, this Court should exercise discretion under 28 U.S.C. § 1404(a) to transfer this case to the United States District Court for the Western District of Missouri--Southern Division. Transfer would materially advance the interests of justice and the convenience of the witnesses and parties.

O'Reilly is an auto parts retailer. It owns and operates 1193 stores located in 18 states (38 judicial districts) throughout the country.[2] Nothing ties the vast majority of these stores, or their employees, to the Northern District of Texas, Dallas Division. Rather, these stores collectively have their greatest connection to the Southern Division of the Western District of Missouri, seated in Springfield, Missouri, the location of O'Reilly's corporate headquarters.

Because O'Reilly is headquartered in Springfield, Missouri, that is where it makes decisions regarding the payroll and timekeeping policies implicated by Salinas' allegation that, on a nationwide basis, O'Reilly required its hourly-paid employees to work "off the clock." O'Reilly's Human Resources department is in Springfield; thus, the key witnesses live there as

[1] O'Reilly contends that this case cannot appropriately proceed as a nationwide collective action. O'Reilly has no national policy or practice requiring that employees work overtime "off the clock." Nonetheless, because Salinas and her lawyers clearly intend to prosecute this matter as a nationwide collective action (and, indeed, already have nationally advertised it as such), O'Reilly is obliged to seek transfer to the venue appropriate to defend against such a claim, even if the allegation is without merit: the centrally-located, corporate headquarters where corporate HR policies are established, implemented and enforced; where the witnesses who are responsible for those policies reside; and where the payroll records and personnel files for thousands of hourly employees dispersed across at least 18 states and 38 judicial districts are maintained.

[2] These states include Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Tennessee, Texas and Virginia.

well. Similarly, O'Reilly's employment and payroll records from its 1193 stores are maintained in Springfield, and Springfield is centrally located and more convenient than Dallas to most of O'Reilly's stores.

These facts and others demonstrate that this case, in the context of a nationwide collective action, is more convenient to litigate in Western District of Missouri, Southern Division, and should be transferred there.

II. FACTS

A. The Lawsuit

On August 26, 2004, Plaintiff Anna Salinas, a former O'Reilly employee, filed her Original Collective Action Complaint for herself and others similarly situated, alleging that O'Reilly employees were required to work "off the clock" in violation of the Fair Labor Standards Act ("FLSA"). (Complaint ¶ 3.) Salinas resides in Midlothian, Texas, within the Northern District of Texas, Dallas Division. (*Id.* ¶ 2.) Salinas issued nationally-circulated press releases touting her lawsuit as a nationwide collective action affecting 1183 stores in 18 states, and soliciting witnesses and additional plaintiffs. (App. 001 - 006 (Press Releases).) Since issuing those press releases nationally, three other O'Reilly ex-employees have filed consents in this action, none of whom reside within the Dallas division: (1) Patrick Gruesbeck resides in College Station, Texas, within the Southern District of Texas, Houston Division; (2) Donna Seay lives in Watauga (Tarrant County), Texas, within the Northern District of Texas, Fort Worth Division; and (3) Jay O'Neal is from Oklahoma City, Oklahoma, within the Western District of Oklahoma. (App. 009 (Affidavit of Steve Pope ¶ 10).)

Plaintiff's counsel has stated, both to the media and to defense counsel, that Plaintiff intends to prosecute this case as a nationwide collective action. (App. 001 - 006; 012 - 014 (Press Releases; Newspaper Article; 9/30/04 Letter).) Plaintiff's pleadings allege that the putative class members "are those employees who are similarly situated to Plaintiff in that their relevant job duties and pay provisions were similar to Plaintiff," but provides no other details concerning the basis for a collective action. (Complaint ¶ 3.) Plaintiff held four non-exempt positions during her tenure at O'Reilly: Retail Services Specialist, Night Manager, Assistant Manager and Delivery Specialist. (App. 009 (Pope Aff. ¶ 11).) The putative class, therefore, could include current and former employees holding any of these four positions at 1193 stores in 18 states (or 38 judicial districts) during the last two to three years, depending on the applicable limitations period.[3]

As of October 6, 2004, O'Reilly employed approximately 5700 people nationwide in the Retail Services Specialist, Assistant Manager and Delivery Specialist positions. (App. 009 (Pope Aff. ¶ 12).)[4] Turnover increases the number of these employees by about 80% on an annual basis. (*Id.*) In other words, the putative collective action class could potentially consist of a large number of people residing in many different judicial districts throughout the country.[5]

B. Corporate Information Pertaining to O'Reilly

O'Reilly is a Missouri corporation headquartered in Springfield, Missouri. (App. 007 (Pope Aff. ¶ 2); Complaint ¶ 4.) As the attached map shows, O'Reilly's 1193 stores are located throughout the Midwest, South and Southeast. (App. 015.) Springfield is located almost exactly in the geographical center of this area. (*Id.*)

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[3] The FLSA limitations period is two years preceding the filing of the consent in a collective action, or three years in the case of a willful FLSA violation. 29 U.S.C. § 2617(c)(1)-(2). Plaintiff alleges that O'Reilly willfully violated the FLSA. (Complaint ¶ 13.) O'Reilly vigorously denies *any*, much less a willful, FLSA violation. Nevertheless, Plaintiff's allegation of willfulness implicates a three-year limitations period, thus increasing the size of the putative collective action class.

[4] O'Reilly eliminated the Night Manager position earlier this year. Most employees in that job were reclassified as either Assistant Managers or Retail Service Specialists. (App. 009 (Pope Aff. ¶ 12).)

[5] Plaintiff likely does not dispute this, as Plaintiff's counsel has already told the media that this case may involve thousands of plaintiffs in 18 states, and that counsel believes FLSA violations within O'Reilly are "widespread." (App. 001 - 006; 012 - 014 (Press Releases; Newspaper Article; 9/30/04 Letter).)

O'Reilly's Human Resources department is based in Springfield. (App. 008 (Pope Aff. ¶ 6).) No Human Resources employees work at the store level and, in fact, only a handful of Human Resources employees work outside Missouri. (*Id.*) Only one O'Reilly Human Resources employee is situated in Dallas. (*Id.*)

All significant decisions concerning the policies and procedures that will be pertinent to this case (timekeeping, payroll and FLSA compliance) were made by the Human Resources Department in Springfield. (App. 008 (Pope Aff. ¶ 7).) All training programs on timekeeping and FLSA compliance were developed in Springfield, and most, if not all, store managers received their FLSA training in Springfield. (*Id.*) Moreover, all payroll records and the personnel files of current and former employees are maintained or archived in Springfield. (*Id.* ¶ 8.) These documents will be important to both sides in this case, and considering the purported scope of the plaintiff class, will undoubtedly be voluminous.

III. DISCUSSION AND AUTHORITIES

A. Transferring This Case to the Western District of Missouri Would Best Serve the Convenience of the Parties and Witnesses and the Interest of Justice.

Transfer of this case to the Southern Division of the Western District of Missouri will best serve the convenience of the parties and witnesses and the interests of justice.[6] Through Section 1404(a), Congress sought to "prevent the waste of 'time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). The Court should consider "'all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.'" *Isbell v. DM Records, Inc.*, No. Civ. A. 3:02-CV-1408G, 2004 WL 1243153, at *13 (N.D. Tex. June 4, 2004) (quoting *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989)).

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[6] 28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

This case could have been brought in the Western District of Missouri's Southern Division because O'Reilly "resides" there. 28 U.S.C. § 1391. Because that prong of the venue test is met, the critical issue is "whether the 'convenience of parties and witnesses, in the interest of justice' requires" a venue transfer. *In re: Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir.), *cert. denied*, 124 S. Ct. 826 (2003).

The relevant factors are: (1) the convenience of the material witnesses; (2) the convenience of the parties; (3) the relative ease of access to sources of proof; (4) where the events at issue took place; (5) the availability of process to compel the presence of unwilling witnesses; (6) the cost of obtaining the presence of witnesses; (7) calendar congestion, and (8) the interests of justice in general. *Isbell*, 2004 WL 1243153, at *14. The decision to transfer a case pursuant to Section 1404(a) is committed to the sound discretion of the district court judge. *Id.*

On balance, these factors weigh in favor of transfer to the Western District of Missouri, Southern Division.

1. The Convenience of the Material Witnesses Favors Missouri

"The convenience of the witnesses is arguably the most important factor in deciding whether a case should be transferred pursuant to section 1404(a)." *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 714 (E.D. Tex. 1998). When evaluating convenience, courts consider both the number of witnesses residing outside the district and the importance of their testimony. *See Apache Prods. Co. v. Employers Ins.*, 154 F.R.D. 650, 655 (S.D. Miss. 1994) (noting that "[t]he court should take into account both the quantitative *and* qualitative aspects of witness convenience"); *Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823, 825 (S.D. Tex. 1993) (The "convenience of one key witness may outweigh the convenience of numerous less important witnesses."). The human resources witnesses located in Springfield, whose knowledge is integral to the issues implicated by a collective action, clearly would find Missouri more convenient than Dallas. Additionally, Springfield's central location makes it more convenient, or at least as convenient as, Dallas for most other anticipated witnesses in a collective action context.

a. *Non-party witnesses*

The convenience and availability of non-party witnesses receive the most weight in the convenience analysis. *See Houston Trial Reports, Inc. v. LRP Publ'ns, Inc.*, 85 F. Supp. 2d 663, 668-69 (S.D. Tex. 1999). O'Reilly is unaware of any specific non-party witnesses that either side expects to testify. The most likely category of necessary non-party witness will be former store managers who supervised any opt-in plaintiffs. Because of the nationwide scope of the class Plaintiff alleges, these witnesses could live all over the country. Thus, centrally-located Springfield is just as convenient or more convenient, on the whole, than Dallas.

b. *Party witnesses*

The only witness Plaintiff has identified (besides herself, her attorneys and opt-in plaintiff Gruesbeck) is David O'Reilly, Defendant's CEO. (App. 017 (Pl.'s Initial Disclosures).) Mr. O'Reilly resides in Springfield, Missouri. (App. 007 (Pope Aff. ¶ 3).)

Presently, based solely on the generalized allegations of a nationwide collective action and the requirement of a central policy or practice affecting all employees in such instance, O'Reilly anticipates it will require testimony from four key witnesses, all of whom are in Springfield:

(1) Jim Maynard, O'Reilly's Director of Team Member Relations, who has knowledge of complaints of unpaid overtime (or the lack thereof), as well as store manager training on FLSA requirements and compliance;

(2) Steve Pope, O'Reilly's VP for Human Resources, who has knowledge of O'Reilly's personnel policies, including timekeeping and payroll policies;

(3) Charlie Stallcup, O'Reilly's Director of Training, who has knowledge of corporate training on the timekeeping system; and

(4) Brett Heintz, O'Reilly's Director of Retail Systems, who has knowledge of store timekeeping systems.

(App. 007 - 008 (Pope Aff. ¶¶ 1, 4).)

O'Reilly may also need testimony from store managers who supervised any opt-in plaintiffs, but these managers will be scattered across the country, like the putative collective action plaintiffs themselves. Thus, centrally-located Springfield is just as convenient, or more convenient, than Dallas for many of them.

2. The Parties' Convenience Favors Missouri.

The Western District of Missouri, Southern Division, is a far more convenient forum for Defendant. O'Reilly is headquartered in Springfield, Missouri, and thus nearly all of Defendant's key witnesses and documents are there. (App. 007 - 008 (Pope Aff. ¶¶ 2, 3, 4, 6, 8).) The ease of access to key witnesses and their live testimony, particularly in a trial of any length, clearly is significant to a convenience analysis.

Similarly, the convenience of the many opt-in plaintiffs weighs in favor of a trial in Springfield, Missouri. While courts typically give some weight to Plaintiff's choice of forum, that is not so when "the plaintiff purports to bring a nationwide class action." *Eugene v. McDonald's Corp.*, No. 96 C 1469, 1996 WL 411444, at *2 (N.D. Ill. July 18, 1996). In that case, "courts do not accord weight to [plaintiff's] choice of forum because other members of the putative class might be inconvenienced by the selection." *Id.*; *see also Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) ("[W]here there are hundreds of potential plaintiffs, . . . the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.").

Plaintiff Salinas and Opt-in Plaintiff Seay reside within the Dallas and Fort Worth Divisions, respectively, of the Northern District of Texas. Due to the diversity of the putative plaintiff class, however, the Northern District of Texas, Dallas Division, will not be more, or even equally, convenient for the rest of the potential plaintiffs. For example, Opt-in Plaintiff O'Neal resides in Oklahoma City, which is only 75 miles closer to Dallas than Springfield. O'Neal will have to get on a plane regardless of the forum. (App. 021 - 022 (Mileage Calculation).)

The remaining potential opt-in plaintiffs in this putative nationwide collective action could come from 18 states (and 38 judicial districts) across the country. For such plaintiffs' generally, it will be just as convenient, or more convenient, to travel to centrally-located Springfield, Missouri as to Dallas, Texas.[7]

Because Springfield is far more convenient for Defendant, and more (or equally) convenient than Dallas for many potential opt-in plaintiffs, this factor weighs in favor of transfer.

3. Missouri Provides Easier Access to Sources of Proof.

"Depending on the nature of the case, the location of books and records can be of paramount importance when deciding whether a case should be transferred." *Henderson v. AT&T Corp.*, 918 F. Supp. 1059, 1066 (S.D. Tex. 1996). The location of documents is of great importance to the convenience analysis in two situations. The first is when the case involves a large amount of documents. *See Mobil Corp. v. SEC*, 550 F. Supp. 67, 70-71 (S.D.N.Y. 1982) (transferring case based on location of about 7,000 documents). The second is when liability ultimately hinges on the contents of documents. *See Dupre*, 810 F. Supp. at 827 (refusing to transfer case because it was a personal injury suit in which documents were not critical to a determination of liability); *Foster v. Litton Indus., Inc.*, 431 F. Supp. 86, 87 (S.D.N.Y. 1977) (considering the location of records to be very important in shareholders derivative suit). Both of

7 Springfield is centrally located to O'Reilly's stores. It has a large airport serviced by major carriers such as American, Delta, United and Northwest airlines. (App. 010 (Pope Aff. ¶ 14).)

these situations exist here.

The employment files of O'Reilly's current and former employees are maintained in Springfield, Missouri. (App. 008 (Pope Aff. ¶ 8).) All payroll records likewise are maintained in Springfield. (*Id.*) Employees' timesheets typically are maintained in the location where they worked. (*Id.*) These documents are key, because the whole case is about when people worked, for how long, and how much they were paid.

Such records are likely voluminous as well, considering the thousands of potential plaintiffs and the nationwide scope Salinas' counsel intends to pursue. There are currently around 5700 employees in the various positions held by Salinas. That alone may implicate access to 5700 employment files (or an estimated minimum of 144,000 pages of documents. (App. 009 - 010 (Pope Aff. ¶¶ 12, 13).) When also accounting for documents relating to former employees over a two or three year limitations period, as well as the additional types of files and documents Plaintiff may conclude she would like to consider, the number of documents that must be subject to easy access for review and production could easily surpass 500,000 pages. (*Id.* ¶¶ 12, 13.)

Because O'Reilly's records are voluminous and, more importantly, so significant to the determination of liability and damages, and of applicable defenses, this factor alone weighs heavily in favor of transfer. Because the documents are in Springfield, Missouri, this lawsuit should be there, too.

4. Most Relevant Events Occurred Outside the Northern District of Texas.

The place of the alleged wrong is of "primary importance" in the venue determination. *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 732 (S.D. Tex. 2002). "A fundamental principle guiding the Court's analysis is that litigation should proceed in that place where the case finds its center of gravity." *Laitram Corp. v. Hewlett-Packard Co.*, 120 F. Supp.

2d 607, 609 (E.D. La. 2000). This factor strongly favors a Springfield, Missouri venue.

First, Plaintiff's counsel contends generally, without citing any defining or limiting facts, that O'Reilly's alleged FLSA violations are "widespread," affecting employees in 18 states. (App. 001 - 006; 012 - 014 (Press Releases; Newspaper Art.).) Thus, Plaintiff concedes that the relevant events occurred not only in the Northern District of Texas, Dallas Division, but throughout 18 states (which encompasses 38 judicial districts). Indeed, two of the three opt-in plaintiffs were never employed within the Northern District of Texas. (App. 009 (Pope Aff. ¶ 19).) Centrally-located Springfield is thus the most logical forum.

Moreover, to properly maintain a nationwide collective action, Plaintiff cannot rely on a few alleged FLSA violations at a few stores. Pockets of overtime errors made here and there by local store managers will not support a nationwide class. Instead, Plaintiff must prove a company sponsored or company-orchestrated policy or scheme for working "off the clock." That is the only way a nationwide collection of plaintiffs who worked for different managers at different stores can achieve "similarly situated" status. *See Levinson v. Primedia, Inc.*, No. 02 Civ. 2222 (CBM), 2003 WL 22533428, at *1 (S.D.N.Y. Nov. 6, 2003) (To prove plaintiffs are "similarly situated" for purposes of a collective action, they must "demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law."); *Jackson v. New York Tel. Co.*, 163 F.R.D. 429, 431-32 (S.D.N.Y. 1995) (To demonstrate that they are "similarly situated" for purposes of a collective action, plaintiffs must make "substantial allegations that the putative class members were together the victims of a single decision, policy or plan" or a common illegal scheme).

Because Salinas must show that all opt-in plaintiffs were victims of a common policy or plan, the locus of the "wrongdoing" (if it exists) can only be O'Reilly's corporate offices, where it set payroll and time-keeping policy, implemented payroll and time-keeping procedures, and disseminated and enforced payroll and time-keeping practices. (App. 008 (Pope Aff. ¶ 7).) Indeed, all training materials on payroll, timekeeping and FLSA compliance are prepared in Springfield. O'Reilly even brings its store managers to Springfield to receive their training on, among other things, the FLSA's requirements and FLSA compliance. (*Id.*) It only makes sense to litigate this case in the district and division where such plans or policies (if they exist) were developed, and where the O'Reilly personnel alleged to have engaged in such conduct (if it occurred) live and work.

5. Missouri Will Provide Equal if not Greater Availability of Process for Witnesses.

Typically, "a person who is not a party or an officer of a party" cannot be subpoenaed to testify at trial if he would have "to travel more than 100 miles" from his home, work or place where he regularly conducts business in person. FED. R. CIV. P. 45(c)(3)(A)(ii); *see generally* 9 James Wm. Moore, *Moore's Federal Practice* § 45 (3d ed. 2004).

Because Plaintiff intends to pursue this case on a nationwide basis, there could be many potential witnesses (for example, former store managers) in at least 18 states around the country who are not subject to a trial subpoena in Texas or in Missouri. This illustrates the rationale, particularly in the case of a "nationwide" collective action, for centering the lawsuit at the venue where the most significant witnesses are located -- here, O'Reilly's corporate human resources personnel.

6. The Cost of Obtaining Presence of Witnesses Will Be Lower in Missouri.

O'Reilly anticipates that four witnesses from corporate headquarters are likely to be important at trial, in addition to various store managers from around the country. Specifically, Jim Maynard, Steve Pope, Charlie Stallcup and Brett Heintz, all of Springfield, Missouri, would be the personnel who can testify to O'Reilly's compliance with the FLSA. Indeed, because mere allegations of widespread "off the clock" work will not give rise to the "nationwide" collective action claimed by Salinas' lawyers, these witnesses will be critical to a prima facie case or defense for either O'Reilly or the plaintiffs.

Venue transfer to the Western District of Missouri, Southern Division, conserves not only the out-of-pocket costs of airfare, hotel and transportation for depositions and trial arrangements for those key witnesses who work at corporate headquarters, but the venue transfer also would minimize disruption of O'Reilly's corporate operations that would inevitably result if these witnesses are absent from their important roles in daily operations because the Plaintiff or the Court requires them to be available on short notice during trial, or for its duration, or in connection with their testimony for O'Reilly. More importantly, to the extent Plaintiff Salinas anticipates actually proving her collective action allegations, her ability to depose and subpoena these witnesses is also critical.

7. Relative Calendar Congestion Does Not Disfavor Missouri.

Relative court congestion between the Western District of Missouri and the Northern District of Texas neither favors nor disfavors a transfer. According to the Judicial Caseload Profiles available at *www.uscourts.gov*, there are only nominal differences between the two districts in the length of time between case filing and trial. (App. 023 - 024 (Judicial Caseload Profile Information).) This factor should thus have neutral weight in the Court's analysis.

8. Transfer of this Action to the Western District of Missouri Will Promote the Interests of Justice.

The concluding prong of the venue transfer test is whether a transfer to the Western District of Missouri will promote the interests of justice generally. "[B]ecause this case is in the early stages, there is little chance that a transfer of venue will result in delay or prejudice to either side." *Barton v. Young*, 144 F. Supp. 2d 685, 688 (E.D. Tex. 2001). This case has barely begun; the parties have conducted no discovery. There is no particular tie to the Northern District of Texas, Dallas Division, other than the named-plaintiff resides there -- and that factor has little weight in a class action generally and a collective action particularly, since the crux of such action is the overarching, systemic wrongdoing that purportedly is the basis for prosecuting the claims collectively. Additionally, given the central location of Springfield, Missouri, the occurrence of material events there, the location of the documents there, the residence there of the key witnesses for both sides of the dispute, and the inconvenience, disruption and unnecessary expense to Defendant of litigation in Texas, the Western District of Missouri, Southern Division, not only is a more convenient forum, but it is the judicial district where the case has its "center of gravity."

IV. CONCLUSION

For all of the reasons stated herein and in O'Reilly's concurrently filed Motion to Transfer Venue, Defendant O'Reilly respectfully requests, pursuant to Section 1404(a), that the Court enter an Order transferring this action to the United States District Court for the Western District of Missouri, Southern Division.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing has been sent to the following counsel of record this the 15th day of October 2004:

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